

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7551

IN THE
UNITED STATES COURT OF APPEALS
For The Second Circuit

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant.

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

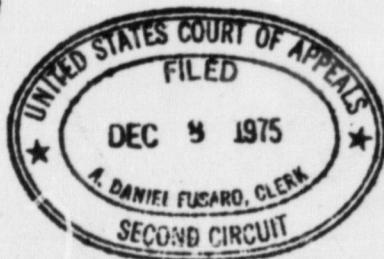
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 74 Civ. 5237

APPENDIX ON APPEAL

GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff-Appellant
503 East Washington Street
Syracuse, New York 13202

WEISMAN, CELLER, SPETT, MODLIN
& WERTHEIMER
Attorneys for Defendant Westinghouse
Electric Corporation
425 Park Avenue
New York, New York 10022



ORIGINAL

7

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Docket Entries.....	1
Summons.....	4
Complaint.....	5
Amended Answer.....	11
Notice of Motion for Default Judgment on Counterclaim.....	13
Affidavit in Support of Motion for Default Judgment on Counterclaim.....	15
Reference to Exhibits.....	20
Clerk's Certificate of Plaintiff's Default in Replying to Counterclaim.....	21
Judge's Memo Endorsed - April 4, 1975.....	23
Notice of Motion to Set Aside the Default Under Rule 55 (c).....	24
Affidavit in Support of Motion to Set Aside the Default Under Rule 55 (c).....	26
Exhibit "A", Proposed Reply.....	29
Judge's Memo Endorsed - April 4, 1975.....	31
Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment.....	32
Notice of Motion for Default Judgment on Counterclaim.....	42
Affidavit in Support of Motion for Default Judgment on Counterclaim.....	44
Reference to Exhibits.....	51
Judge's Memo Endorsed - June 27, 1975.....	52

TABLE OF CONTENTS (continued)

	PAGE
Affidavit in Opposition to Defendant's Motion for Default Judgment on Counterclaim.....	53
Notice of Motion and Motion to Modify Orders....	56
Affidavit in Support of Motion and Motion to Modify Orders.....	58
Exhibit "A", Letter.....	61
Judge's Memo Endorsed - July 2, 1975.....	62
Letter Withdrawing Motion.....	63
Notice of Settlement of Judgment on Counterclaim.....	64
Judgment on Counterclaim.....	65
Notice of Motion and Motion Under Rule 60 (b) FRCP.....	67
Reference to Exhibits.....	69
Affidavit in Support of Motion and Motion Under Rule 60 (b) FRCP.....	70
Judge's Memo Endorsed.....	74
Affidavit in Opposition to Plaintiff's Motion Under Rule 60 (b) FRCP.....	75
Reference to Exhibits.....	83
Exhibit "K".....	84
Exhibit "L".....	89
Notice of Appeal - September 19, 1975.....	92
Notice of Appeal - October 9, 1975.....	93
Order Consolidating Appeals.....	94

DOCKET ENTRIES

IN THE

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 75-7551

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

Civil No. 74 Civ. 5237

INDEX TO THE RECORD ON APPEALDOCUMENTS

Certified Copy of Docket Entries	A-C
Docket Sheet From United States District Court, Northern District of New York and Following Documents:	1
Petition for Removal	1
Answer	1
Notice of Motion for Transfer, Memo Endorsed Briant, J., 11-25-74	1
Amended Answer	1
Affidavit in Opposition to Transfer	1
Letter of Transmittal to Southern District of New York	1
Stipulation for Substitution of Attorneys, Memo Endorsed 1-21-75, Weinfeld, J.	2
Defendant's Request to Enter Default on Counterclaim	3
Defendant's Notice of Deposition	4
Stipulation Adjourning Motion, Memo Endorsed 2-25-75, Weinfeld, J.	5
Notice of Motion to Set Aside Default, Memo Endorsed 4-1-75, Weinfeld, J.	6

DOCKET ENTRIES

Docket No. 75-7551

Case No. 74 Civ. 5237

Memo of Law in Support of Motion to set Aside Default	7
Notice of Motion for a Protective Order, Memo Endorsed 4-4-75, Weinfeld, J.	8
Memo of Law in Support of Motion for Protective Order	9
Notice of Motion for Default Judgment on Counterclaim, Memo Endorsed 4-4-75, Weinfeld, J.	10
Affidavit of Defendant in Opposition to Motion For a Protective Order	11
Memo of Law in Opposition to Motion for a Protective Order	12
Affidavit in Opposition to Motion to Set Aside Default	13
Memo of Law in Support of Motion for Default Judgment	14
Memo of Law in Opposition to Motion to Set Aside Default	15
Answering Affidavit of Defendant	16
Notice of Motion to Modify Orders, Memo Endorsed 7-2-75, Weinfeld, J.	17
Notice of Motion for Default Judgment on Counterclaim, Memo Endorsed 6-27-75, Weinfeld, J.	18
Letter Withdrawing Motion to Modify Orders	19
Judgment on Counterclaim	20
Motion for Enlargement of Time to Appeal, Memo Endorsed 8-29-75, Owen, J.	21
Notice of Motion Under Rule 60 (b), Memo Endorsed 9-25-75, Weinfeld, J.	22
Memo of Law in Support of Motion Under Rule 60 (b)	23
Affidavit in Opposition to Motion Under Rule 60 (b)	24

DOCKET ENTRIES

Docket No. 75-7551

Case No. 74 Civ. 5237

Memo of Law in Opposition to Motion Under Rule 60 (b)	25
Notice of Appeal	26
Supplemental Affidavit in Support of Motion Under Rule 60 (b)	27
Supplemental Memo of Law in Opposition to Motion Under Rule 60 (b)	28
Clerk's Certificate	29

INDEX TO SUPPLEMENTAL RECORD ON APPEALDOCUMENTS

Certified Extract of Docket Entries	D
Notice of Appeal by Plaintiff dated October 9, 1975	30
Clerk's Certificate	31

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

ISMAEL ABU KHADRA, d/b/a THE
MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff

against

WESTINGHOUSE ELECTRIC CORPORATION AND
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.
200 Park Avenue, New York, N.Y.

Defendant S

Index No.

Plaintiff designates

Onondaga

County as the place of trial

The basis of the venue is

Business address of
Plaintiff

Summons

Plaintiff ~~XXXXXXXX~~ Business
address: Syracuse, N.Y.

County of Onondaga

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 30 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, September 27, 1974

GEORGE T. MAHSHIE, ESQ.

Attorney(s) for Plaintiff

Office and Post Office Address
503 E. Washington St.
Syracuse, N.Y., 13202
(315) 474-4628

COMPLAINT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

COMPLAINT

vs

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,
200 Park Avenue, New York, New York

Defendants.

Plaintiff by and through his attorney, George T. Mahshie,
alleges and shows to this Court as follows:

AS AND FOR A FIRST CAUSE OF ACTION:

1. That Plaintiff maintains an office for the transaction of its business at 505 East Washington Street, Syracuse, New York.
2. That upon information and belief, the defendant is a foreign corporation licensed to do business in the State of New York and maintains an office for the regular transaction of its business at 200 Park Avenue, New York, New York.
3. That Plaintiff is in the electrical and mechanical contracting business; that is, that the Plaintiff undertakes contracts for electrical and mechanical works on building projects, supplying work, labor, services and materials pursuant to any contract or project for a valuable consideration.
4. That defendant manufactures and/or sells electrical and mechanical materials that are used in the construction of

COMPLAINT

various buildings and projects for a valuable consideration.

5. That on or about the 20th day of March, 1972, Plaintiff and Defendant entered into negotiations for the purchase and sale of certain materials that Plaintiff would require to fulfill a certain contract in the construction of an airport located in Riyadh, Saudi Arabia, which negotiations culminated in an agreement whereby the material aforementioned would be supplied by the Defendant for an agreed, fair and reasonable value.

6. That at the time of the aforementioned negotiations, between Plaintiff and Defendant herein, Plaintiff did make known to Defendant that Plaintiff was the Sub-Contractor on the Riyadh, Saudi Arabia project from a general contractor and said general contract had a time completion date with a liquidated damage clause.

7. That Defendant did warrant and represent to Plaintiff that they could and would deliver the material, subject of the contract of purchase and sale aforementioned, in accordance with the plans and specifications required and that they would deliver same within the time as allotted by the agreement with the general contractor, knowing that the period of time allotted by the general contractor included not only manufacturing and delivery, but installation as well.

8. That Defendant was in fact incompetent and incapable of performance in accordance with the terms and conditions of the agreement of purchase and sale which resulted in Defendant being unable to deliver within the required time limits by regular freight shipping lines and therefore required Plaintiff to hire special chartered airplanes for air freight delivery

COMPLAINT

in order to perform under Plaintiff's contract with the general contractor at a cost to the Plaintiff in extra shipping charges in the sum of ONE HUNDRED FIFTY FIVE THOUSAND DOLLARS (\$155,000.00).

9. That because of the aforementioned premises, Plaintiff has been damaged in the sum of ONE HUNDRED FIFTY FIVE THOUSAND DOLLARS (\$155,000.00).

AS AND FOR A SECOND, SEPARATE AND
COMPLETE CAUSE OF ACTION AGAINST DEFENDANT:

10. Plaintiff alleges and re-alleges allegations numbered "1" through "8" herein as if the same were set forth herein in total and further shows to this Court:

11. That Defendant, in order to induce Plaintiff to purchase the material subject of the purchase and sale agreement aforementioned, did in fact warrant and represent to the Plaintiff that they were experienced in the designing, manufacturing, delivery and installation of such equipment and were competent and capable to a sufficient degree to so perform.

12. That in fact, Defendant was not competent nor experienced sufficiently to perform in accordances with the terms and conditions of the purchase and sale agreement as a result of which Defendant was unable to deliver all of the materials subject of the agreement and/or contract of purchase and sale and further, those items that were delivered were such that many were not in accordance with the required specifications; were not made in a good workman like manner, as a result of which they were either unusable and had to be replaced or required altering at a further cost and expense to Plaintiff.

COMPLAINT

13. That because of the aforementioned premises, Plaintiff has been damaged in the sum of TWO HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$225,000.00).

AS AND FOR A THIRD, SEPARATE AND COMPLETE
CAUSE OF ACTION AGAINST DEFENDANT:

14. Plaintiff alleges and re-alleges allegations numbered "1" through "12" with the same force and effect as if set forth herein in total and further shows to this Court:

15. Defendant made its false and fraudulent representations as set forth hereinbefore, knowing that Plaintiff would rely upon such representations and in reliance thereon would be induced to enter into the agreement of purchase and sale.

16. That Plaintiff did in fact rely upon Defendants' false and fraudulent representations and in reliance thereon entered into the contract of purchase and sale and that as a result thereof, Plaintiff has been damaged in the further sum of TWO HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$225,000.00).

AS AND FOR A FOURTH, SEPARATE AND COMPLETE
CAUSE OF ACTION AGAINST DEFENDANT:

17. Plaintiff alleges and realleges allegations numbered "1" through "15" with the same force and effect as if set forth herein in total and further shows to this Court:

18. That as a result of Defendants incompetence, negligence, misrepresentations and inexperience, Plaintiff was required to retain further consultants and other laborers, his overhead was continued for a further period of time; he was required to pay over-time to employees; he was required to pay interest on monies borrowed and he was put to further expense in regard to

COMPLAINT

extensions of Letters of Credit, all to his further damage in the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00).

AS AND FOR A FIFTH, SEPARATE AND COMPLETE CAUSE OF ACTION AGAINST DEFENDANT:

19. Plaintiff alleges and realleges allegations numbered "1" through "18" with the same force and effect as if set forth herein in total and further shows to this Court:

20. That because of the delay caused to Plaintiff by Defendant, Plaintiff was unable to undertake any other projects or contracts resulting in further damage to Plaintiff in the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00).

AS AND FOR A SIXTH, SEPARATE AND COMPLETE CAUSE OF ACTION AGAINST DEFENDANT:

21. Plaintiff alleges and realleges allegations numbered "1" through "20" with the same force and effect as if set forth herein and further shows to this Court:

22. That as a result of Defendants incompetence, negligence, misrepresentations and inexperience, Plaintiff was delayed in the performance of his contract with the general contractor which materially effected his reputation in the area wherein he was located and has caused the loss of further business, as a result of which, Plaintiff has been further damaged in the sum of ONE MILLION DOLLARS (\$1,000,000.00).

AS AND FOR A SEVENTH, SEPARATE AND COMPLETE CAUSE OF ACTION AGAINST DEFENDANT:

23. Plaintiff alleges and reallegations allegations numbered "1" through 22" hereinwith the same force and effect as if set forth herein in total and further shows to this Court:

24. That because of Defendants refusal to settle the

COMPLAINT

legitimate claims herein, Plaintiff has been caused further expense in retaining counsel to bring these actions, in addition to costs and disbursements.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

- (a) In the First Cause of Action in the sum of ONE HUNDRED FIFTY FIVE THOUSAND DOLLARS (\$155,000.00).
- (b) In the second cause of action in the sum of TWO HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$225,000.00).
- (c) In the Third cause of action in the sum of TWO HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$225,000.00).
- (d) In the Fourth cause of action in the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00).
- (e) In the Fifth cause of action in the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00).
- (f) In the Sixth cause of action in the sum of ONE MILLION DOLLARS (\$1,000,000.00).
- (g) In the Seventh cause of action for reasonable attorneys fees, together with costs and disbursements of these actions.

DATED: Syracuse, New York
September 27, 1974

Yours, etc.
GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
505 E. Washington Street
Syracuse, N.Y., 13202
Tel: (315) 474-4628

AMENDED ANSWER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-
MECHANICAL CORPORATION,

Plaintiff

-VS-

CIVIL ACTION
74-443

WESTINGHOUSE ELECTRIC CORPORATION AND
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants

Defendant Westinghouse Electric Corporation, by its attorneys Bond, Schoeneck & King, for its amended answer to the complaint of the plaintiff herein, alleges as follows:

FOR A FIRST DEFENSE

1. Admits the allegations contained in paragraphs numbered "2" and "4" of the plaintiff's complaint.
2. As to the allegations contained in paragraph "3" of the plaintiff's complaint, this defendant admits that plaintiff is in the electrical contracting business, but denies having knowledge or information sufficient to form a belief as to the balance of the allegations of that paragraph and therefore, denies the same.
3. Denies each and every other allegation in said complaint contained not hereinbefore specifically admitted or controverted.

FOR A SECOND DEFENSE

4. On information and belief, plaintiff has failed to join as a party plaintiff Nacih Dajani, who is a party indis-

AMENDED ANSWER

pensable to the action.

FOR A COUNTERCLAIM

5. Pursuant to an Agreement between plaintiff and defendant Westinghouse Electric Corporation, plaintiff agreed to pay for electrical equipment received by it from defendant Westinghouse Electric Corporation.

6. In October, 1973, plaintiff did receive, pursuant to such Agreement, certain electrical equipment having a value of \$88,798.92 but has refused to pay for such equipment, although due demand therefore has been made on plaintiff by defendant Westinghouse Electric Corporation.

7. Pursuant to the aforesaid Agreement, plaintiff also ordered from defendant other items of electrical equipment having a value of \$22,095.00 which plaintiff subsequently wrongfully refused to accept to the damage of defendant in the amount of \$22,095.00.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action and demands judgment on its counterclaim in the amount of \$110,893.92 with interest.

Dated: November 6, 1974

Yours, etc.

BOND, SCHOENECK & KING

By: 

John J. Dee, Partner
Attorney for Defendant Westinghouse
Electric Corporation
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202

NOTICE OF MOTION FOR DEFAULT JUDGMENT ON COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

- against -

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

Index No.
74 Civ. 5237
(E.W.)

NOTICE OF MOTION
FOR DEFAULT JUDGMENT
ON COUNTERCLAIM

TO: GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and Post Office Address
503 East Washington Street
Syracuse, New York 13202
Tel. No.: (315) 474-4628

PLEASE TAKE NOTICE, that upon the annexed affidavit of Steven A. Chernis, sworn to February 11, 1975, and upon all the pleadings and proceedings heretofore had herein, the undersigned will make application to the Court, before the Honorable Edward Weinfeld, United States District Judge, in Room 128, United States District Courthouse, Foley Square, New York, New York, on the 25th day of February, 1975 at 2:15 P.M. in the afternoon of that day, or as soon as counsel can be heard, for entry of a default judgment, pursuant to Rule 55(b)(2) of the Federal Rules

Notice of Motion for Default Judgment on Counterclaim

of Civil Procedure, in favor of the defendant, Westinghouse Electric Corporation and against the plaintiff for the sum of \$110,893.92 with interest, as demanded in said defendant's counterclaim, upon the ground that plaintiff has failed to reply thereto as required by Rule 12 of the Federal Rules of Civil Procedure; and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: New York, N.Y.
February 11, 1975.

Yours, etc.,

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER

By: 

Steven A. Chernis, A Member of the Firm
Attorneys for Defendant
WESTINGHOUSE ELECTRIC CORPORATION
Office & P.O. Address
425 Park Avenue
New York, New York 10022

Tel.: (212) 371-5400

AFFIDAVIT IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT ON
COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

- against -

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

Index No.
74 Civ. 5237
(E.W.)

AFFIDAVIT IN SUPPORT
OF MOTION FOR DEFAULT
JUDGMENT ON
COUNTERCLAIM

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

STEVEN A. CHERNIS, being duly sworn, deposes and says:

I am a member of the firm of Weisman, Celler, Spett,
Modlin & Wertheimer, attorneys for the defendant, Westinghouse
Electric Corporation (hereinafter "Westinghouse") and I am fully
familiar with all of the facts and circumstances hereinafter set
forth.

I submit this affidavit in support of the instant appli-
cation for the entry of a default judgment, pursuant to Rule
55(b) (2) of the Federal Rules of Civil Procedure, in favor of
Westinghouse and against the plaintiff for the sum of \$110,893.92

Affidavit in Support of Motion For Default Judgment on
Counterclaim

with interest thereon, the amount demanded in Westinghouse's counterclaim, upon the ground that plaintiff has failed to serve a reply to said counterclaim and is presently in default with respect thereto.

JURISDICTION OF THE COURT:

Plaintiff originally commenced this action in the Supreme Court of the State of New York, County of Onandaga, on September 30, 1974. (The named defendant, Westinghouse Electric International, S.A., was never served herein; it is a Swiss corporation and none of its officers or agents ever received process.) Thereafter, on October 22, 1974, Westinghouse filed, in the United States District Court for the Northern District of New York, its petition and bond for removal to said court upon the ground of diversity of citizenship in that plaintiff is a resident and citizen of Saudi, Arabia; Westinghouse is a corporation organized under the laws of the Commonwealth of Pennsylvania and the amount in controversy, as alleged in the complaint, exceeds the sum of \$10,000.00.

HISTORY OF THE PROCEEDINGS:

By order of the United States District Court for the

Affidavit in Support of Motion For Default Judgment on
Counterclaim

Northern District of New York, dated November 25, 1974, the action was transferred, upon Westinghouse's motion, to this Court. By order of this Court, dated January 21, 1975, our firm became substituted in place and stead of the firm of Bond, Schoeneck & King, as attorneys of record of Westinghouse. Copies of the foregoing orders were served upon plaintiff's attorney.

THE DEFAULT:

On November 6, 1974 Westinghouse served, and on November 8, 1974 it filed, its amended answer containing the subject counterclaim. A copy of the said pleading is annexed hereto. The counterclaim seeks the recovery of \$88,798.92, representing the balance due and owing for electrical equipment sold to plaintiff, and \$22,095.00, representing the amount due and owing for electrical equipment which was ordered by plaintiff from and manufactured by Westinghouse, the delivery of which was refused by plaintiff. Accordingly, there is a total due and owing of \$110,893.92 with interest thereon as prayed for in the counterclaim.

The time within which the plaintiff was required to serve a reply or otherwise move with respect to the counterclaim

Affidavit in Support of Motion For Default Judgment on Counterclaim

has expired and he has not replied or otherwise moved with respect to the same. The time for the plaintiff to reply or otherwise move with respect to the counterclaim has not been extended and he is presently in default. The default of the plaintiff has been noted by the Clerk of the Court as shown in his certificate to that effect being submitted to the Court simultaneously herewith.

Although The Soldiers' and Sailors' Civil Relief Act, § 200(1), 50 USC App §520(1) does not appear to require the filing of a non-military affidavit in support of the entry of a default judgment against a "plaintiff," - it states ". . . default of any appearance by the defendant . . ." - upon information and belief, plaintiff is not in the military service. In the affidavit of plaintiff's attorney, sworn to November 21, 1974 and submitted in opposition to the motion to transfer this action, he stated that:

"Plaintiff Ismael Abu Khadra is a citizen and resident of Saudi, Arabia who has no residence or full time place of business in the United States, . . ."

Upon information and belief, based upon all of the files and correspondence in my possession pertaining to this matter, the plaintiff is neither an infant nor an incompetent person.

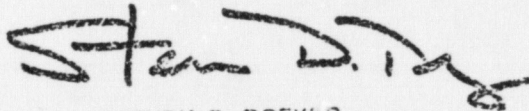
Affidavit in Support of Motion For Default Judgment on
Counterclaim

By reason of all of the foregoing, Westinghouse is entitled to the entry of judgment on its counterclaim against the plaintiff in the sum of \$110,893.92 with interest.

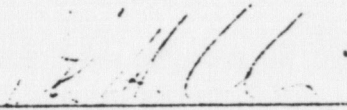
WHEREFORE, your deponent respectfully prays for the entry of judgment as requested above and for such other and further relief as to this Court may seem just and proper in the premises.

Sworn to before me this

11th day of February, 1975.



STEVEN D. DREYER
NOTARY PUBLIC, State of New York
No. 31-6100310
Qualified in New York County
Commission Expires March 30, 1976



Steven A. Chernis

REFERENCE TO EXHIBITS

Exhibits are set forth on following pages:

Summons	4
Complaint	5
Amended Answer	11

CLERK'S CERTIFICATE OF PLAINTIFF'S DEFAULT IN REPLYING TO
COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

- against -

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

Index No.
74 Civ. 5227
(E.W.)

CLERK'S CERTIFICATE
OF PLAINTIFF'S
DEFAULT IN REPLYING
TO COUNTERCLAIM

I, RAYMOND F. BURGHARDT, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the docket entries in the captioned case indicate that this action was originally removed from the Supreme Court, State of New York, Onandaga Courty, to the United States District Court for the Northern District of New York on October 22, 1974; that an answer on behalf of Westinghouse Electric Corp., containing a counterclaim against the plaintiff, was served and filed on October 29, 1974 and that an amended answer on behalf of Westinghouse Electric Corp., containing a counterclaim, was served and filed on November 8, 1974.

I further certify that the docket entries indicate that

Clerk's Certificate of Plaintiff's Default in Replying to
Counterclaim

the plaintiff has not filed a reply and has not otherwise moved
with respect to the counterclaim herein and that the time to
reply or move with respect to said counterclaim has expired.
The default of the plaintiff in replying to the counterclaim is
hereby noted.

Dated: New York, N.Y.

January

1975.

February 14

Ronald F. Bieda

Clerk of the United States
District Court for the
Southern District of
New York

JUDGE'S MEMO ENDORSED

JUDGE'S MEMO ENDORSED - April 4, 1975

4-1-75 Defts. motion for a default judgment on counterclaim is denied. Pltf. is to post a \$25,000.00 bond within 20 days.

So ordered

Edward Weinfeld
U.S.D.J.

NOTICE OF MOTION TO SET ASIDE THE DEFAULT UNDER RULE 55 (c)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

NOTICE OF MOTION
TO SET ASIDE THE
DEFAULT UNDER
RULE 55 (c)

Index No.
74 Civ. 5237

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of George T. Mahshie, Esq., sworn to on the *5th* day of March, 1975 and upon all the pleadings and proceedings heretofore had herein, the undersigned will make application to the Court, before the Honorable Edward Weinfeld, United States District Judge, in Room 128, United States District Courthouse, Foley Square, New York, New York on the 18th day of March, 1975 at 2:15 P.M. in the afternoon of that date, or as soon thereafter as counsel can be heard, for an order to set aside a default entered herein on February 14, 1975 with the Clerk of the United States District Court for the Southern District of New York, under Rule 55 (c) of F.R.C.P., and authorizing plaintiff to make a late filing of a reply and compelling the defendant to accept the same, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: March 4, 1975

Notice of Motion to Set Aside the Default Under Rule 55 (c)

Yours, etc.

GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

TO: WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Defendant
Westinghouse Electric Corporation
425 Park Avenue
New York, New York 10022

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE THE DEFAULT
UNDER RULE 55 (c)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

AFFIDAVIT

vs.

Index No.
74 Div. 5237

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

State of New York)
County of Onondaga)ss:
City of Syracuse)

GEORGE T. MAHSHIE, ESQ., being duly sworn, deposes and
says:

1. That on or about November 8, 1974, deponent received the amended answer of defendant Westinghouse Electric Corporation containing a counterclaim.
2. On the same day or within one or two days thereafter, deponent dictated to a secretary a reply to said counterclaim to be filed and served herein.
3. That deponent was not aware until a Notice of Motion dated February 11, 1975, was served upon him at his office, that the reply which he dictated apparently was never typed, served or filed.
4. That as soon as deponent was advised of the existence of the default, the attorney for defendant Westinghouse Electric Corporation was contacted by telephone; and arrangements were made to adjourn defendant's motion for default judgment to March 18,

Affidavit in Support of Motion to Set Aside the Default
Under Rule 55 (c)

1975, by means of a Stipulation which has heretofore been filed with the Court.

5. Defendant Westinghouse Electric Corporation will in no way be prejudiced, nor will its interest be compromised, nor the trial of this action be delayed by setting aside the default judgment herein, and by authorizing plaintiff to file a reply to the counterclaim herein.

6. That if the order herein prayed is granted, a reply, in substantially the form hereto attached as Exhibit "A" will be promptly filed with the Court and served upon the defendant Westinghouse Electric Corporation.

7. That as more particularly appears in the complaint filed and served herein, it is the contention of plaintiff that defendant breached the alleged agreement between the parties, by reason of its failure to deliver certain merchandise as called for by the agreement; its late delivery of merchandise which was delivered; and the fact that the merchandise that was delivered did not comply with the specifications of the agreement.

8. That the establishment of the facts alleged in the complaint herein would necessarily constitute a complete defense to the counterclaim herein.

9. That the granting of judgment on default herein while the action upon the complaint remains to be tried would interfere with the proper disposition of the issues raised by the complaint and answer, and would enter a judgment which, as deponent verily believes, would be inconsistent with the proof subsequently to be adduced upon the complaint herein.

Affidavit in Support of Motion to Set Aside the Default
Under Rule 55 (c)

WHEREFORE, deponent prays for an order to set aside the default heretofore entered herein, to permit plaintiff to enter a defense to the counterclaim herein, and for such further relief as to the court may seem just and proper in the premises.

George H. H. H.

Sworn to before me this
5th day of March, 1975

Catherine Bower
Notary Public
CATHERINE BOWER
Notary Public in the State of New York
Qualified in 1966, Exp. 12/31/74
My Commission Expires March 30, 1975

EXHIBIT "A", PROPOSED REPLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

REPLY

vs.

Index No.
74 Div. 5237

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

The plaintiff, above named, by and through its attorney, George T. Mahshie, Esq., replying to the counterclaim contained in the answer of the defendant alleges as follows:

1. That plaintiff admits so much of defendant's answer and counterclaim marked and numbered Paragraph 5 as alleges that plaintiff entered into an agreement with defendant Westinghouse Electric Corporation.

2. That plaintiff admits so much of defendant's answer and counterclaim marked and numbered Paragraph 6 as alleges that Westinghouse Electric Corporation has demanded payment for certain equipment.

3. That plaintiff denies each and every other allegation contained in defendant's counterclaim.

WHEREFORE, plaintiff demands judgment dismissing the counterclaim and granting relief to the plaintiff as sought in the original complaint together with such other and further relief as to this court may seem just and proper in the premises.

Dated: March 4, 1975

Exhibit "A", Proposed Reply

Yours, etc.

GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

TO: WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Defendant Westinghouse Electric Corporation
425 Park Avenue
New York, New York 10022

JUDGE'S MEMO ENDORSED

JUDGE'S MEMO ENDORSED - April 4, 1975

4-1-75 Pltffs. motion for an order to set aside
default is granted on condition that pltff.
post a \$25,000.00 bond within 20 days.

So ordered

Edward Weinfeld
U.S.D.J.

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Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment

default in failing to reply to Westinghouse's counterclaim and (ii) further in support of Westinghouse's pending application for the entry of a default judgment or, now, in the alternative, for an order directing plaintiff to post a bond securing payment of the amount sought in said counterclaim.

PLAINTIFF'S MOVING PAPERS ARE PALPABLY
INSUFFICIENT TO AVOID THE ENTRY OF A
DEFAULT JUDGMENT OR TO SUPPORT THE SET-
TING ASIDE OF THE DEFAULT; THERE IS NO
AFFIDAVIT OF MERIT:

As can be observed from the pleadings, this action stems from the sale and delivery of equipment, manufactured by Westinghouse, to plaintiff, a contractor, for installation at an airport in Saudi Arabia. Admitted in the complaint is that equipment was sold and delivered. The counterclaim alleges that by reason of the foregoing, there is now due and owing from plaintiff to Westinghouse the sum of \$110,893.92 with interest. There has been a failure to deny the allegations of the counterclaim and they are thus admitted. The plaintiff is in default and that default has been duly entered as indicated in and by

Affidavit in Opposition to Plaintiff's Motion to Set Aside
His Default and in Support of Westinghouse's Motion to
Enter a Default Judgment

the Clerk's Certificate annexed to Westinghouse's moving papers.

The burden, therefore, is now on the plaintiff to persuade this Court that there is good cause to relieve him of his default. It is respectfully submitted that as a matter of law -- reviewed in the accompanying memorandum of law -- plaintiff has totally failed to discharge that burden and has failed to even remotely or indirectly demonstrate that the sum demanded in the counterclaim is not presently due and owing.

It is first noted that the excuse tendered for the default is hardly sufficient. Plaintiff's attorney states in his affidavit (in Para.2) that he dictated a reply to the counterclaim to his secretary and then, as far as he was concerned, the matter ended. While I do not profess to be a master of law office management, it does seem that an attorney's duty to the Court and to other litigants cannot be so cavalierly discharged. It is the duty of the lawyer to make sure that papers are properly prepared, served and filed in accordance with the applicable statutes and rules of the Courts.

Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment

Moreover, assuming -- since we are not expressly told -- that somewhere, somehow, something went wrong, how is it that a reply to the original answer containing the counterclaim was also never served or filed? Furthermore, where is the affidavit of the lawyer's secretary setting forth the evidentiary facts of the implied "law office failure"?

In any event, putting all of that aside, where is the required demonstration -- by a person having personal knowledge of the facts -- that plaintiff has a defense to the counterclaim or is not otherwise indebted to Westinghouse for said sum?

There is no Alleged Defense, no Showing of Merit, Which Legally Defeats Westinghouse's Present Right of Recovery:

Plaintiff has simply failed to come forth with a single probitive word, by a person having knowledge of the facts, showing that Westinghouse is not entitled to recovery on its counterclaim. The only attempt at persuasion in that regard is by plaintiff's attorney, but he does not state, nor does it otherwise appear, that he has

Affidavit in Opposition to Plaintiff's Motion to Set Aside
His Default and in Support of Westinghouse's Motion to
Enter a Default Judgment

any personal knowledge of the underlying facts. And, the attorney does not even attempt to show that there is merit to his client's cause, he simply refers this Court to the complaint; he states in his affidavit (in Para. 7):

"7. That as more particularly appears in the complaint filed and served herein, it is the contention of plaintiff that defendant breached the alleged agreement between the parties, by reason of its failure to deliver certain merchandise as called for by the agreement; its late delivery of merchandise which was delivered; and the fact that the merchandise that was delivered did not comply with the specifications of the agreement."
(Emphasis added)

But, there are no probative facts set forth in the above averral! Moreover, the complaint itself is not probative of any alleged fact adverted to therein since it is neither verified by the plaintiff or his lawyer for that matter.

The attorney then goes on to make an erroneous statement of law in paragraph 8 of his affidavit; he states:

"8. That the establishment of the facts alleged in the complaint herein would necessarily constitute a complete defense to the counter-claim herein."

Affidavit in Opposition to Plaintiff's Motion to Set Aside
His Default and in Support of Westinghouse's Motion to
Enter a Default Judgment

No so. As indicated in the accompanying memorandum of law, a claim for damages based upon breach of warranty may constitute a cause of action, but it is no defense to a cause of action for the price of goods sold and delivered. Accordingly, for ought that appears in the complaint, Westinghouse would nevertheless be entitled to summary judgment for the price of goods sold and accepted as prayed for in the counterclaim.

Finally, we note that the proposed reply proffered, copy of which is annexed to the plaintiff's moving papers, purports to lack the signature of plaintiff's attorney and would be subject to a motion to strike under Rule 11 of the Federal Rules of Civil Procedure. Furthermore, the blanket denials contained therein are sham and unfair since it clearly is fact that plaintiff entered into an agreement in and by which he agreed to receive the equipment and pay for the same; equipment was sold, delivered and accepted and payment has been demanded and refused. Notably, no affirmative defenses are alleged in the proposed reply.

Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment

Hence, plaintiff has failed to discharge his burden in persuading this Court that his default was excusable and that he has a meritorious defense to the counterclaim.

WESTINGHOUSE WILL BE PREJUDICED BY
A DENIAL OF THE RELIEF IT SEEKS:

Based upon all of the foregoing, and the authorities referred to in the accompanying memorandum of law, it should be readily apparent that Westinghouse is presently entitled to be paid. While the merits of plaintiff's complaint are not to be passed upon here, a perusal of that complaint shows that many of the plaintiff's alleged causes of action would be subject to dismissal for lack of legal sufficiency.

Upon information and belief, resulting from communications received from Westinghouse's correspondent counsel in Saudi Arabia, the current financial condition of plaintiff is unsound. The bank in Saudi Arabia, which financed plaintiff, is now pressing for payment there. In support of plaintiff's motion for a protective order,

Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment

returnable simultaneously herewith, plaintiff's attorney has indicated to the Court that plaintiff would have great difficulty in raising even \$2,000 for a trip to New York; the attorney states:

"10. On information and belief, that because of the financial reverses caused to plaintiff by the acts of defendant alleged in the complaint, plaintiff may have great difficulty in meeting such expenses."

Accordingly, the more time which transpires between now and the time of entry of Westinghouse's judgment, the more likely it will be that Westinghouse will be unable to collect the sum due under the judgment. Time is truly of some essence under these circumstances.

In connection with such time element, and the effect of delay in reducing Westinghouse's prospects of enforcing its judgment against the plaintiff, the Court should observe that in the motion for a protective order, mentioned above, plaintiff is seeking to engraft even more delay into the proceedings by requesting that his deposition -- noticed some six weeks ago on January 30, 1975 -- be postponed for not "... less than three months notice ..."

Affidavit in Opposition to Plaintiff's Motion to Set Aside His Default and in Support of Westinghouse's Motion to Enter a Default Judgment

While that application is being responded to separately, it should be obvious that the very commencement of this lawsuit, with its inherent opportunities for seeking delay, is a vehicle for postponement and procrastination in paying the debt which is long overdue.

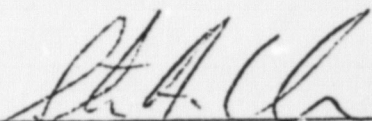
In the Alternative, Plaintiff Should be Required to Post a Bond to Secure any Judgment Entered Against Him Upon Westinghouse's Counterclaim:

By reason of the foregoing, yet with the recognition that the Court might be hesitant in entering a default judgment, Westinghouse is willing to accept a bond to secure the payment of any judgment which may be rendered against the plaintiff upon Westinghouse's counterclaim, in lieu of entry of a default judgment. The acceptance of such a bond would, however, be subject to the Court's Approval of the surety thereon.

WHEREFORE, your deponent respectfully requests an order denying the plaintiff's application and granting Westinghouse's motion for the entry of a default judgment or, in the alternative, requiring the plaintiff to post a bond securing payment of any judgment to be entered upon

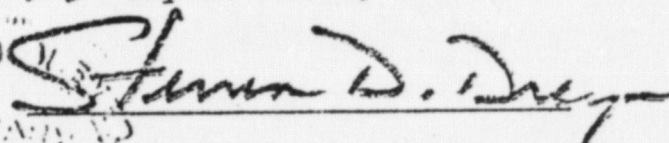
Affidavit in Opposition to Plaintiff's Motion to Set Aside
His Default and in Support of Westinghouse's Motion to
Enter a Default Judgment

Westinghouse's counterclaim and for such other and further
relief as to this Court may seem just and proper in the
premises.


STEVEN A. CHERNIS

Sworn to before me, this

17th day of March, 1975.


STEVEN D. DREYER
NOTARY PUBLIC, State of New York
No. 31-6100910
Qualified in New York County
Commission Expires March 30, 1976

NOTICE OF MOTION FOR DEFAULT JUDGMENT ON COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

-against-

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

Index No.
74 Civ. 5237
(E.W.)

NOTICE OF MOTION
FOR DEFAULT JUDG-
MENT ON COUNTER-
CLAIM

----- x
TO: GEORGE T. MAHSMIE, ESQ.
Attorney for Plaintiff
Office and Post Office Address
503 East Washington Street
Syracuse, New York 13202
Tel. No.: (315) 474-4628

PLEASE TAKE NOTICE, that upon the annexed affidavit of Steven D. Dreyer, sworn to May 16, 1975, and upon all the pleadings and proceedings heretofore had herein, the undersigned will make application to the Court, before the Honorable Edward Weinfeld, United States District Court, in Room 706, United States District Courthouse, Foley Square, New York, New York, on the 27th day of May, 1975 at 2:15 P.M. in the afternoon of that day,

Notice of Motion for Default Judgment on Counterclaim

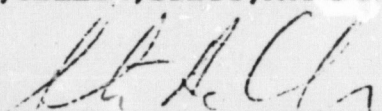
or as soon as counsel can be heard, for entry of a default judgment, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, in favor of the defendant, Westinghouse Electric Corporation and against the plaintiff for the sum of \$110,893.92 with interest, as demanded in said defendant's counterclaim, upon the ground that plaintiff has failed to comply with the provisions of the order of Judge Edward Weinfeld, filed herein on April 4, 1975, which set aside plaintiff's default in replying to defendant's counterclaim upon condition that plaintiff post a \$25,000.00 bond within twenty (20) days thereafter; and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: New York, New York
May 16, 1975

Yours, etc.

WEISMAN, CELLER, SPETT, MONTY & WERTHEIMER

By


Steven A. Chernis, a Member of the Firm
Attorneys for Defendant
WESTINGHOUSE ELECTRIC CORPORATION
Office & P.O. Address
425 Park Avenue
New York, New York 10022
Tel.: (212) 371-5400

AFFIDAVIT IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT ON
COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

Index No.
74 Civ. 5237
(E.W.)

-against-

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

AFFIDAVIT IN SUPPORT
OF MOTION FOR DEFAULT
JUDGMENT ON COUNTER-
CLAIM

- - - - -x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

STEVEN D. DREYER, being duly sworn, deposes and says:

I am an associate of the firm of Weisman, Celler, Spett,
Modlin & Wertheimer, attorneys for the defendant, Westinghouse
Electric Corporation (hereinafter "Westinghouse") and I am
fully familiar with all of the facts and circumstances hereinafter
set forth.

I submit this affidavit in support of the instant ap-
plication for the entry of a default judgment, pursuant to rule

Affidavit in Support of Motion for Default Judgment on
Counterclaim

55(b)(2) of the Federal Rules of Civil Procedure, in favor of Westinghouse and against the plaintiff for the sum of \$110,893.92 with interest thereon, the amount demanded in Westinghouse's counterclaim, upon the ground that plaintiff has failed to comply with the order of Judge Edward Weinfeld filed herein on April 4, 1975, which set aside plaintiff's default in replying to Westinghouse's counterclaim upon condition that plaintiff post a \$25,000.00 bond within twenty days thereafter.

JURISDICTION OF THE COURT

Plaintiff originally commenced this action in the Supreme Court of the State of New York, County of Onandaga, on September 30, 1974. (The named defendant, Westinghouse Electric International, S.A., was never served herein; it is a Swiss corporation and none of its officers or agents ever received process.) Thereafter, on October 22, 1974, Westinghouse filed, in the United States District Court for the Northern District of New York, its petition and bond for removal to said court upon the ground of diversity of citizenship in that plaintiff is a resident and citizen of Saudi, Arabia; Westinghouse is a corporation organized under the laws of the Commonwealth of Pennsylvania and the amount in controversy, as alleged in the complaint, exceeds the sum of \$10,000.00.

Affidavit in Support of Motion for Default Judgment on
Counterclaim

HISTORY OF THE PROCEEDINGS

By order of the United States District Court for the Northern District of New York, dated November 25, 1974, the action was transferred, upon Westinghouse's motion, to this Court. By order of this Court, dated January 21, 1975, our firm became substituted in place and stead of the firm of Bond, Schoeneck & King, as attorneys of record of Westinghouse. Copies of the foregoing orders were served upon plaintiff's attorney.

THE DEFAULT IN REPLYING AND THE DEFAULT
IN POSTING THE BOND

On November 6, 1974 Westinghouse served, and on November 8, 1974 it filed, its amended answer containing the subject counterclaim. A copy of the said pleading is annexed hereto. The counterclaim seeks the recovery of \$88,798.92, representing the balance due and owing for electrical equipment sold to plaintiff, and \$22,095.00, representing the amount due and owing for electrical equipment which was ordered by plaintiff from and manufactured by Westinghouse, the delivery of which was refused by plaintiff. Accordingly, there is a total due and owing of \$110,893.92 with interest thereon as prayed for in the counterclaim.

Affidavit in Support of Motion for Default Judgment on
Counterclaim

The time within which the plaintiff was required to serve a reply or otherwise move with respect to the counterclaim expired and he did not reply or otherwise move with respect to the same. The time for the plaintiff to reply or otherwise move with respect to the counterclaim had not been extended and, at the time Westinghouse moved, as hereinbelow discussed, for a default judgment plaintiff was in default, as noted by the certificate to that effect of the Clerk of this Court, copy of which is annexed hereto, which was heretofore submitted to this Court.

In or about February 1975, Westinghouse served motion papers, returnable February 25, 1975, upon plaintiff for a default judgment with respect to its counterclaim. At the request of plaintiff's attorney and with the Court's permission the said motion was adjourned to March 18th.

Prior to the adjourned return date of Westinghouse's motion, plaintiff moved for an order setting aside the said default which was also made returnable on March 18th.

Affidavit in Support of Motion for Default Judgment on
Counterclaim

On the return date of the parties' respective motions counsel for both sides appeared before Judge Edward Weinfeld who, thereupon granted plaintiff's motion to set aside the default upon condition that plaintiff post a \$25,000.00 bond within twenty days thereafter.

The Judge's decision was reduced to an order to that effect which was filed on April 4, 1975.

More than twenty days have passed since the filing of the said order but plaintiff has not posted the \$25,000.00 bond as required.

Since the setting aside of plaintiff's default in reply to Westinghouse's counterclaim was conditioned upon his posting the requisite bond, plaintiff's failure to comply with such condition has rendered the said order inoperative.

Accordingly, Westinghouse is now entitled to the entry of judgment upon defendant's default in replying to the counterclaim.

Affidavit in Support of Motion for Default Judgment on
Counterclaim

Although the Soldiers' and Sailors' Civil Relief Act, §200(1), 50 USC App §520(1) does not appear to require the filing of a non-military affidavit in support of the entry of a default judgment against a "plaintiff," - it states " . . . default of any appearance by the defendant . . . " - upon information and belief, plaintiff is not in the military service. In the affidavit of plaintiff's attorney, sworn to November 21, 1974 and submitted in opposition to the motion to transfer this action, he stated that:

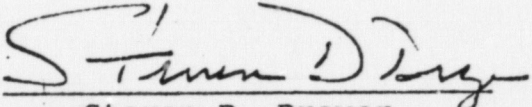
"Plaintiff Ismael Abu Khadra is a citizen and resident of Saudi, Arabia who has no residence or full time place of business in the United States, . . . "

Upon information and belief, based upon all of the files and correspondence in my possession pertaining to this matter, the plaintiff is neither an infant nor an incompetent person.

By reason of all of the foregoing, Westinghouse is entitled to the entry of judgment on its counterclaim against the defendant in the sum of \$110,893.92 with interest.

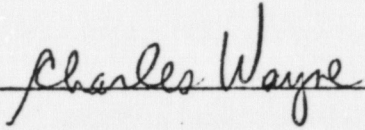
Affidavit in Support of Motion for Default Judgment on
Counterclaim

WHEREFORE, your deponent respectfully prays for the
entry of judgment as requested above and for such other and
further relief as to this Court may ^o seem just and proper in the
premises.


Steven D. Dreyer

Sworn to before me this

16th day of May, 1975



CHARLES WAYNE
NOTARY PUBLIC, State of New York
No. 30-9554150
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976

REFERENCE TO EXHIBITS

Exhibits are set forth on following pages:

Summons	4
Complaint	5
Amended Answer	11
Clerk's Certificate of Plaintiff's Default in Replying to Counterclaim	21

JUDGE'S MEMO ENDORSED

JUDGE'S MEMO ENDORSED - June 27, 1975

6-24-75 Deft. Westinghouse's motion for default
judgment on counterclaim hereby granted.

So ordered.

Edward Weinfelf
U.S.D.J.

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR DEFAULT
JUDGMENT ON COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

ANSWERING
AFFIDAVIT

Index No.
74 Civ. 5237
(E.W.)

State of New York)
County of Onondaga)ss:
City of Syracuse)

GEORGE T. MAHSHIE, being duly sworn, deposes and says:

1. That he is an attorney at law duly licensed to practice in the State of New York with an office for the regular practice of his profession being located at 503 East Washington Street, Syracuse, New York.

2. That your deponent has represented the plaintiff in the instant action since the inception thereof and is the attorney of record therein, and is therefore fully acquainted with all of the facts and circumstances surrounding the same.

3. That associated with your deponent in this matter is one John S. Hogg, Esq., an attorney at law duly licensed to practice in the State of New York with an office for the regular practice of his profession being located at 503 East Washington Street, Syracuse, New York.

4. That the aforementioned John S. Hogg, Esq. did journey to New York to argue a certain motion to permit the late filing of a Reply to the counterclaim in the instant action and upon his return

Affidavit in Opposition to Defendant's Motion for Default
Judgment on Counterclaim

did inform your deponent that the Court had made an oral Order permitting the serving of the Reply on condition that a bond be posted in a sum certain.

5. That on the following dates your deponent did write to the plaintiff herein at his address in the City of Riyadh, Saudi Arabia, to wit: April 1, 1975, April 3, 1975, April 22, 1975 and teletexes were sent on March 31, 1975 and May 19, 1975.

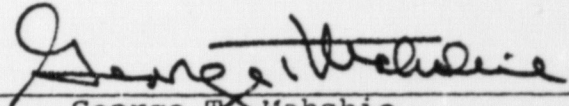
6. That your deponent did not receive any answers to the aforementioned until May 25, 1975 at approximately between the hours of 6:00 o'clock and 7:00 o'clock in the afternoon of said date at which time your deponent received a telephone call from the plaintiff indicating that some of the aforementioned letters had not been received, but the ones that were received did not arrive until a month after they had been mailed and that is the reason for the failure to reply. Further, it was stated that the teletexes were also tardy in arriving.

7. That as a result of the aforementioned telephone conversations, in that there were actually a first phone call from Saudi Arabia followed by a second telephone call to your deponent at his home in which the plaintiff informed your deponent that he would immediately gather information to show that he was indebted to the sum of 4,000,000 Riyals as a result of the facts and circumstances giving rise to this cause of action and that the papers to substantiate such facts would be transmitted in the immediate future, but that the time of receipt here could not be guaranteed.

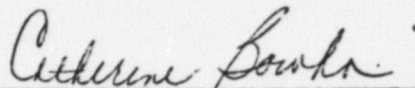
3. That your deponent informed the plaintiff that there was now a motion pending for summary judgment on the counterclaim

Affidavit in Opposition to Defendant's Motion for Default
Judgment on Counterclaim

and that your deponent would telephone the plaintiff in Riyadh,
Saudi Arabia on Wednesday, the 28th day of May, 1975 between the
hours of 11:00 o'clock in the afternoon and 2:00 o'clock in the
afternoon of said date to inform him of the results thereof.


George T. Mahshie

Sworn to before me this
21st day of May, 1975


Notary Public

CATHERINE BOWKA
Notary Public in the State of New York
Qualified in June 1974 No. 345400223
My Commission Expires March 15, 1976

NOTICE OF MOTION AND MOTION TO MODIFY ORDERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiffs,

- against -

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

NOTICE OF MOTION AND MOTION
TO MODIFY ORDERS

Index No. 74 Civ. 5237 (E.W.)

Please take notice that upon the annexed affidavit of Ismael Abu Khadra, sworn to June 19, 1975, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before Honorable Edward Weinfeld, United States District Judge, in Room 2804, United States District Court House, Foley Square, New York, New York, on the 1st day of July, 1975 at 2:15 p.m. in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order modifying two certain orders heretofore entered herein by Honorable Edward Weinfeld on the 4th day of April, 1975 which require plaintiff to post a \$25,000 bond as a condition for denial of defendant's motion for a default judgment on its counterclaim, and as a condition for granting plaintiff's motion to set aside its default upon said counterclaim under FRCP 55 (c); by removing and eliminating from said orders the requirement that plaintiff be required to post said bond, on the ground that

1. Because plaintiff is insolvent, and unable to post such a bond, the requirement of such a bond is an unconstitutional deprivation of due process; and
2. The Court is without authority to impose such a condition upon plaintiff; and

Notice of Motion and Motion to Modify Orders

-2-

3. The imposition of such condition is grossly inequitable in the circumstances of this case.
4. Entry of judgment upon plaintiff's failure to post bond will unwarrantedly complicate and delay disposition of this action.

GEORGE T. MAHSHIE
Attorney for Plaintiff

John S. Hogg
Of Counsel
Office and Post Office Address
503 East Washington Street
Syracuse, New York 13202

TO: Weisman, Celler, Spett, Modlin & Wertheimer
Attorneys for Defendant Westinghouse Electric Corporation
425 Park Avenue
New York, New York 10022

AFFIDAVIT IN SUPPORT OF MOTION AND MOTION TO MODIFY ORDERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE
EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

AFFIDAVIT

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

State of New York)
County of Onondaga) ss:
City of Syracuse)

ISMAEL ABU KHADRA, being duly sworn, deposes and says:

1. That I am over 21 years of age and that I am a citizen of the Kingdom of Saudi Arabia and the named plaintiff herein.

2. That I reside and am engaged in business in the City of Riyadh in the aforementioned Kingdom and I am engaged in the electrical and mechanical contracting business in the said Kingdom.

3. That I am the same Ismael Abu Khadra, the owner of The Middle East Electro-Mechanical Corporation and Al Karawan, which are companies engaged in the electrical and mechanical contracting business in the Kingdom of Saudi Arabia and that the said companies are not corporations as known in the United States, but rather as an individual doing business under an assumed name.

4. That I make this affidavit in support of a motion to reconsider an order made by this court requiring me, as plaintiff, to post a security bond in the sum of \$25,000.00 as a

Affidavit in Support of Motion and Motion to Modify Orders

condition for permitting me to submit a late reply and I state unequivocally that because of the actions of the defendant in failing to deliver in accordance with time schedules, in failing to deliver in accordance with specifications and in failing to deliver at all, I have suffered a financial loss as a result thereof resulting in my being indebted to the National Commercial Bank of Saudi Arabia in the sum of 3036921.16 Saudi Arabian Riyals, which Saudi Arabian Riyal is currently exchanged at the rate of 3.5 for one American dollar.

5. That because of the situation resulting from the actions of the defendant I have been placed in a financial condition which would not permit me to post the bond as heretofore mentioned or as a matter of fact any bond of such magnitude, although I have attempted to obtain such bond or its equivalent and have been denied thereof, and to substantiate this allegation, reference is made to a letter of the National Commercial Bank of Saudi Arabia dated May 31, 1975, hereto attached and made a part hereof as Exhibit "A", which original letter is written in English and attached to the same is the Arabic translation thereof, and which document has been authenticated by the Chamber of Commerce of Riyadh, Saudi Arabia, the Minister of Foreign Affairs of the Saudi Arabian Government and the Office of the Consul of the United States in Jeddah, Saudi Arabia.

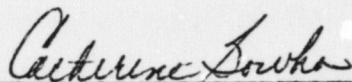
6. That unless the court grants an order rescinding the bond previously mentioned, I will be deprived of my day in court and will not be able to be heard to recover the tremendous loss which I have sustained as a result of the defendant's wrongful

Affidavit in Support of Motion and Motion to Modify Orders

acts and as explained to me by my attorneys, the further implications of my inability to make the aforementioned bond would result in further injury to me by the granting of a judgment to the defendant thus adding to my losses.

7. That unless the relief sought herein is granted I will not only be deprived of my day in court, but this would result in a grave injustice and may be not only detrimental, but fatal to my business.

Sworn to before me this
19th day of June, 1975


Notary Public

CATHERINE BOWKA
Notary Public in the State of New York
Qualified in O.S.P. No. 36-6488225
My Commission Expires March 22, 1976

السادة الكروان

ص. ب. : ٢٤٤

الرياض

السعودية

السادة

الكروان
الرياض

أشاره الى خطابكم بتاريخ ١٩٧٥/٥/٢٨ والذي تطلبون فيه

أصدار خطاب ضمان بمبلغ ٢٥٠٠٠ دولار لصالح المحكمة في الولايات المتحدة
نود أن نفيذكم بأننا لانستطيع إصدار مثل هذا الضمان والذي ترتب عن مشاكلكم
وقضائكم بخصوص عليه مطار الرياض الدولي .

وبالمناسبة نود أن نشير هنا بأنه يجب عليكم أن تقوموا بعمل تسوية لحسابكم
المدين بمبلغ ٣٠٣٦٩٢١١٦ ريال وألا سنضطر أسفنين الى مقاضاتكم
وهذا لن يكون في صالحكم .

عن البنك الاهلي التجارى

أمضاء
KINGDOM OF SAUDI ARABIA
PROVINCE OF HJAZ
CITY OF JEDDA
EMBASSY OF THE UNITED STATES OF AMERICA

S. 59

I, Willie J. Green, ~~xxxx~~ Consul of the
United States of America in Jidda, Saudi Arabia, duly commis-
sioned and duly sworn, hereby certify that Mohammed
Nasser Al-Rashidan ----

whose signature and official seal are, respectively, subscribed
and attested, and that the document was at the time of sign-
ing the same for Director, Office of the Royal
Ministry of Foreign Affairs in Riyadh, Saudi Arabia
to whose official acts faith and credit are due.

For the contents of the annexed document the Embassy
assumes no responsibility.

IN WITNESS WHEREOF I have hereunto set my hand
and the seal of this office this 7th day of
June, 1975.

WILLIE J. GREEN

CONSUL OF THE UNITED STATES OF AMERICA

الكروان
الرياض

عدد ٢٦٠٤١٢
وزارة الخارجية غير مسؤولة عن محتويات الوثيقة
نصادق على صحة ختم المفوضة العامة بالربط
وتوقيع مدير مكتب المفوض العام
١٣٩٥/٥/٢٨
الموافق ١٩٧٥/٥/٢٨
عبد / مدير مكتب المفوض العام بالرياض
عبد

مختار رشيد

الكروان
الرياض

البنك الأهلي التجاري

The National Commercial Bank

C. R. 1588

Teleg. (MOWAFFAK)

P. O. Box 104

JEDDAH

PARTNERSHIP
HEAD OFFICE JEDDAH
SAUDI ARABIA

Foreign Department.

Date:

٩٥٣١٦/١٠٩٩

Riyadh: 31/5/1975.

الكروان

الرياض

/S. ALKARAWAN,
P.O. BOX NO. 244,
RIYADH,
S. ARABIA.

Dear Sirs,

We refer to your letter dated 28/5/1975 requesting us to issue a Letter of Guarantee for US\$25,000.- in favour of UNITED STATES COURT. we wish to advise you that we are not in a position to issue such guarantee owing to your outstanding obligations which have been occurred as a consequence of your implementation to RIYADH AIRPORT OPERATION.

الكروان

الرياض

Consequently, we affirm hereby that you have urgently to make possible arrangements in order to settle your debit balance with us due on you amounting SR.3036921.16 otherwise we will be compelled to take necessary legal procedures which will be against your interest.

Awaiting to hear from you as soon as possible we remain,

Riyadh Chamber of Commerce & Industry
Certifies The Signature of

Date 16/5/75 Secretary General

الكروان

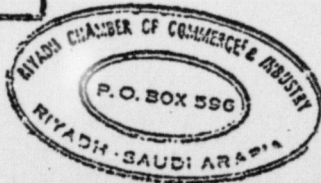
الرياض

For/M. M. Jamouze
Bank - Riyadh Branch.

For The National Commercial
Yours Faithfully,

FOR THE NATIONAL COMMERCIAL BANK,

RIYADH BRANCH.



JUDGE'S MEMO ENDORSED

JUDGE'S MEMO ENDORSED - July 2, 1975

7-1-75 Motion withdrawn as per attached letter.

So ordered

Edward Weinfeld
U.S.D.J.

LETTER WITHDRAWING MOTION

George T. Mahshie

ATTORNEY AND COUNSELOR AT LAW

OFFICE: 474-4628

RES: 446-0611

503 EAST WASHINGTON STREET - SYRACUSE, NEW YORK 13202

June 27, 1975

Clerk
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Abu-Khadra vs.
Westinghouse
Index No. 74 Civ. 5237 (E.W.)

Dear Sir:

Please be advised that the attorney for the moving plaintiff hereby withdraws the notice of motion, motion and supporting papers filed herein and returnable on July 1, 1975 before the Hon. Edward Weinfeld, and request that the same be stricken from the motion calendar for that date and returned to this office.

With thanks for your courtesy and cooperation, I remain

Very truly yours,

GEORGE T. MAHSHIE

John S. Hogg
Of Counsel

NOTICE OF SETTLEMENT OF JUDGMENT ON COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ISMAEL ABU KHADRA, d/b/a THE MIDDLE
EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

: Index No.
74 civ. 5237
: (E.W.)

-against-

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL,
S.A.,

: NOTICE OF SETTLEMENT
OF JUDGMENT ON
: COUNTERCLAIM

Defendants.

-----X

S I R:

PLEASE TAKE NOTICE that a Judgment on Counterclaim
of which the within is a true copy will be submitted to the
Honorable Edward Weinfeld, one of the Judges of the within
named Court at the Courthouse at Foley Square, New York, New
York on July 22, 1975 at 10:00 A.M.

Dated: New York, New York
July 14, 1975

Yours, etc.

WEISMAN, CELLER, SPETT, MODLIN
& WERTHEIMER
Attorneys for Defendant Westinghouse
Electric Corporation
425 Park Avenue
New York, New York 10022
Telephone No. (212) 371-5400

TO: GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
503 East Washington Street
Syracuse, New York 13202
Telephone No. (315) 474-4628

JUDGMENT ON COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ISMAEL ABU KHADRI, d/b/a THE MIDDLE	:	Index No.
EAST ELECTRO-MECHANICAL CORPORATION,	:	74 Civ. 5237
	:	(E.W.)
Plaintiff,	:	
	:	JUDGMENT ON
-against-	:	<u>COUNTERCLAIM</u>
	:	
WESTINGHOUSE ELECTRIC CORPORATION and	:	
WESTINGHOUSE ELECTRIC INTERNATIONAL,	:	
S.A.,	:	
	:	
Defendants.	:	
	:	
-----X	:	

Defendant, Westinghouse Electric Corporation, having moved this Court for entry of a default judgment in favor of said defendant and against the plaintiff for the sum of \$110,893.92 with interest as demanded in said defendant's counterclaim, and said motion having duly come on to be heard before the undersigned United States District Judge on June 24, 1975, and the Court having filed its order on June 27, 1975, granting said motion, and there being no just reason for delay of entry of this judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is

ORDERED, ADJUDGED AND DECREED, that defendant, Westinghouse Electric Corporation, have judgment against

Judgment on Counterclaim

the above-named plaintiff in the sum of \$110,893.92, with interest thereon from November 6, 1974 to July 23, 1975, at the rate of 6% per annum, amounting to \$4,731.44, for a total of \$115,625.36, together with costs to be taxed by the Clerk.

Dated: New York, New York
July 22, 1975

EDWARD WEINFELD
U.S.D.J.

JUDGMENT ENTERED

July 24, 1975

151 Raymond Burghardt
Clerk

NOTICE OF MOTION AND MOTION UNDER RULE 60 (b) FRCP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU-KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

NOTICE OF MOTION AND
MOTION UNDER RULE
60 (b) FRCP

Index No. 74 Civ.
5237 (E.W.)

PLEASE TAKE NOTICE that upon the annexed affidavit of Ismael Abu-Khadra, sworn to on the 19th day of June, 1975 and the affidavit of James P. Fitzpatrick, Esq., sworn to on the 31st day of August, 1975, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before the Hon. Edward Weinfeld, United States District Judge, in Room 128, United States District Court House, Foley Square, New York, New York, on the 9th day of September, 1975 at 2:15 P.M. in the afternoon of that day, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 60 (b) FRCP setting aside a certain default entered upon the counterclaim herein on February 14, 1975, and a certain default judgment entered thereon on July 23, 1975, and authorizing plaintiff to file his Reply herein, upon the ground that

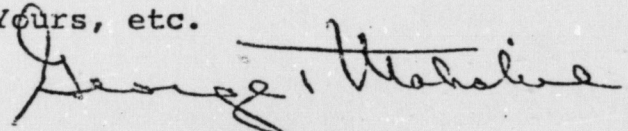
1. Said default resulted from excusable neglect; and
2. The entry of the judgment herein was inequitable in the circumstances of this case; and
3. Because the facts of the counterclaim are and remain at issue in this action, the entry of a default judgment upon

Notice of Motion and Motion Under Rule 60 (b) FRCP

the same issues unwarrantably complicates and delays
disposition of the within action; and
for such other and further relief as to this Court may seem just and
proper.

Dated: August 28, 1975

Yours, etc.



GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

TO: WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Defendant Westinghouse Electric Corporation
425 Park Avenue
New York, New York 10022

REFERENCE TO EXHIBITS

The Affidavit of Plaintiff with Exhibit is set forth
on Page 58.

AFFIDAVIT IN SUPPORT OF MOTION AND MOTION UNDER RULE 60 (b)
FRCP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU-KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

AFFIDAVIT

Index No. 74 Civ.
5237 (E.W.)

State of New York)
County of Onondaga) ss:
City of Syracuse)

JAMES P. FITZPATRICK, being duly sworn, deposes and says:

1. That your deponent is an attorney at law, duly licensed to practice in the State Courts of the State of New York and in the Federal Court of the Northern District of New York.

2. That your deponent is associated with George T. Mahshie, Esq., the attorney for the plaintiff herein as trial counsel in the above case.

3. That during June and July of 1975 I appeared as counsel for George T. Mahshie, Esq. and represented the plaintiff, a Saudi Arabian National, at his deposition held in the offices of the attorneys for the defendant, Westinghouse Electric Corporation in New York City, New York.

4. That this affidavit is being made in support of a motion under Federal Rule 60 (b) to set aside a default judgment entered in favor of the defendant Westinghouse Electric Corporation upon its counterclaim.

That this affidavit is being made by your deponent rather than the plaintiff himself in that the plaintiff has returned to Saudi

Affidavit in Support of Motion and Motion Under Rule 60 (b)

Arabia and it would be extremely difficult because of the language barrier and geographical distances to have the plaintiff himself make this affidavit and further by reason of the fact that your deponent is familiar with the facts and circumstances of this case and with the testimony which the plaintiff gave under oath at said deposition.

5. That upon information and belief the defendant in answer to plaintiff's complaint also counterclaimed against the plaintiff for the sum of \$110,893.92, to which plaintiff, through his attorneys, inadvertently and mistakenly failed to serve a timely reply. That as a result of said inadvertence and mistake, following extended proceedings disclosed in the record, a default judgment was entered upon said counterclaim.

6. That the counterclaim arises by reason of the defendant's contention that the plaintiff did not pay the defendant in full pursuant to the terms of the contract between the parties.

7. The plaintiff testified under oath in the aforementioned deposition as to the essential cause of action against the defendant, which was that the defendant in fact defaulted in complying with the terms of its contract with plaintiff as follows:

- (1) That defendant was at all times apprised by the plaintiff that time of delivery of the items which were the subject of this contract was of the essence in that the plaintiff had a penalty clause in its contract with the general contractor. Pursuant to said understanding the defendant assured the plaintiff that these delivery dates would create no problems and that the materials would be shipped by sea in plenty of time for the plaintiff to comply with the terms of its contract with the general contractor. That the

Affidavit in Support of Motion and Motion Under Rule 60 (b)
FRCP

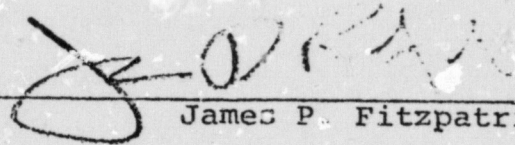
defendant failed to live up to the terms of its agreement in that it did not ship many of the items under the contract in time which required the plaintiff to arrange for shipment by air to avoid the penalty clause of his construction contract. That this shipment by air caused plaintiff to incur additional and substantial out of pocket costs not contemplated when contracting with the defendant resulting in damages to the plaintiff in the sum of approximately \$152,500.00.

- (2) That plaintiff further testified that many of the items to be supplied, that were in fact delivered, did not comply with the specifications which were by reference a part of the contract between plaintiff and defendant, which caused substantial delay to plaintiff and in many cases, said items not conforming to specifications could not be used, which resulted in damages to the plaintiff in the sum of \$28,150.00.
- (3) That in addition to the aforementioned the plaintiff testified under oath that many items under the contract between the parties hereto were never in fact supplied by the defendant nor received by the plaintiff, which items plaintiff had to procure from other sources resulting in an out of pocket expense to the plaintiff in the amount of \$196,613.00.
- (4) That in addition thereto plaintiff sustained other items of damage by reason of the defendant's failure to perform its part of the contract in the nature of back charges from the general contractor, consultation fees, bank

Affidavit in Support of Motion and Motion Under Rule 60 (b)
FRCP

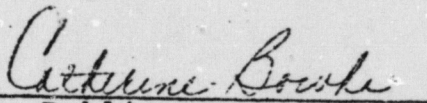
interest incurred by reason of the delay, bank charges for extensions of the letters of credit, which extensions were requested by the defendant and also loss of business by reason of not being able to procure performance bonds subsequent to the Riyadh Airport contract, which was occasioned as a result of defendant's breach of contract.

8. That your deponent is familiar with all of the facts of this case and verily believes that the plaintiff has a valid, subsistent and meritorious cause of action as against the defendant and has provable out of pocket damages and expenses in excess of \$600,000.00 with additional provable damages for loss of business in a sum in excess of \$1,000,000.00.



James P. Fitzpatrick

Sworn to before me this
24th day of August, 1975



Notary Public

CATHERINE BOWKA
Notary Public in the State of New York
Qualified in 1968, No. 21-5403225
My Commission Expires March 1, 1976

JUDGE'S MEMO ENDORSED

JUDGE'S MEMO ENDORSED - September 25, 1975

9-24-75 The within motion made pursuant to Rule
60 (b) of the Federal Rules of Civil
Procedure is denied.

So ordered

Edward Weinfeld
U.S.D.J.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION UNDER RULE 60 (b) FRCP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----*

ISMAEL ABU-KHADRA, d/b/a THE MIDDLE EAST : Index No. 74 Civ.
ELECTRO-MECHANICAL CORPORATION, 5237 (E.W.)

Plaintiff, :

-against - : AFFIDAVIT IN OPPOSITION
TO PLAINTIFF'S MOTION
UNDER RULE 60(b) FRCP

WESTINGHOUSE ELECTRIC CORPORATION and :
WESTINGHOUSE ELECTRIC INTERNATIONAL, :
S.A., :

Defendants. :

-----*

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MILTON WAXENFELD, being duly sworn, deposes and
says:

I am an attorney duly admitted to practice before
this Court and a member of the firm of WEISMAN, CELLER, SPETT,
MODLIN & WERTHEIMER, attorneys for defendant WESTINGHOUSE
ELECTRIC CORPORATION. The other defendant named herein,
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A., has not been served
with process or appeared, and therefore reference hereinafter

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

to defendant will be to defendant WESTIN HOUSE ELECTRIC CORPORATION.

I am fully familiar with all the pleadings and proceedings heretofore had herein and I submit this affidavit in opposition to plaintiff's motion for an Order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) to set aside plaintiff's default in replying to defendant's counterclaim, to set aside the judgment entered against plaintiff upon defendant's counterclaim, and to permit plaintiff to file a reply to defendant's counterclaim without the necessity of posting any bond.

Plaintiff's instant motion should be denied because it is a fourth attempt by plaintiff to have this Court permit him to cure his default in replying to defendant's counterclaim without the necessity of posting any bond. In effect, plaintiff's instant motion is also the latest in a series of attempts to reargue prior unsuccessful applications by plaintiff to dispense with the posting of a \$25,000 bond previously ordered by this Court.

Moreover, by reason of a recent ex parte application by plaintiff to Judge Richard Owen, in the absence of Judge Edward Weinfeld to whom this case is assigned, plaintiff has obtained an enlargement of time to September 21, 1975

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

within which to appeal from the judgment against plaintiff on defendant's counterclaim, admittedly for the purpose of making the instant motion. Rule 60(b) was not intended to be, and should not be permitted to be utilized as a substitute for an appeal by plaintiff from the aforesaid judgment.

PRIOR PROCEEDINGS

1. On February 15, 1975, following plaintiff's default in replying to defendant's counterclaim, defendant made a motion, returnable on February 25, 1975, for entry of a default judgment against plaintiff on defendant's counterclaim in the sum of \$110,893.25. Annexed hereto as Exhibit "A" is a copy of defendant's said motion for entry of default judgment. Pursuant to stipulation, said motion was adjourned to March 18, 1975.

2. On March 5, 1975, plaintiff made a motion, solely on the affidavit of his attorney, returnable on March 18, 1975, for an order, pursuant to Rule 55(c) of FRCP, to set aside plaintiff's default and authorizing plaintiff to make a late filing of a reply. A copy of plaintiff's motion papers is annexed hereto as Exhibit "B", and a copy of defendant's affidavit in opposition thereto and in support of defendant's motion for judgment is annexed hereto as Exhibit "C".

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

3. On April 1, 1975, the adjourned date of said motions, Judge Weinfeld denied defendant's motion for a default judgment and granted plaintiff's motion to set aside his default, on condition that plaintiff post a \$25,000 bond within 20 days. Annexed as Exhibit "D" is a copy of the Order conditionally granting plaintiff's motion.

4. On May 16, 1975, plaintiff having failed to post the required bond, defendant made a motion, returnable on May 27, 1975, for the entry of a default judgment pursuant to Rule 55(b)(2) of FRCP upon the ground of plaintiff's failure to comply with the above condition. Annexed hereto as Exhibit "E" is a copy of defendant's said motion papers. Plaintiff's attorney submitted to the Court an affidavit in opposition to said motion, a copy of which is annexed hereto as Exhibit "F".

5. On May 27, 1975, the return date of defendant's said motion for the entry of a default judgment, Judge Weinfeld adjourned said motion to June 24, 1975 at which time the parties were to return and report to the Court as to whether the Order with respect to posting of a bond had been complied with. In effect, Judge Weinfeld granted plaintiff a month's extension in which to post the required bond.

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

6. On June 23, 1975, the day preceding the adjourned date of defendant's motion for judgment, defendant's counsel received in the mail motion papers by plaintiff, returnable on July 1, 1975, for an order eliminating from the prior Orders of Judge Weinfeld the requirement that plaintiff post a \$25,000 bond as a condition to vacating his default. Annexed hereto as Exhibit "G" is a copy of plaintiff's said motion papers.

7. On June 24, 1975, the adjourned date of defendant's motion for a default judgment, Judge Weinfeld made an Order granting defendant's motion for judgment on its counterclaim, a copy of which is annexed hereto as Exhibit "H", and denied an oral application by plaintiff's counsel to further adjourn the motion pending the hearing of plaintiff's aforesaid motion made returnable on July 1st. Consequently, plaintiff's counsel advised the Court, by letter dated June 27, 1975, of the withdrawal of plaintiff's said motion returnable July 1, 1975, and Judge Weinfeld made an Order on July 1, 1975 that plaintiff's said motion was withdrawn in accordance with said letter. Annexed hereto as Exhibit "I" are copies of said letter of plaintiff's counsel and of said Order.

8. On July 14, 1975, defendant noticed settlement of a judgment on its counterclaim, which judgment was thereafter

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

signed on July 22, 1975 and entered on July 24, 1975. Annexed hereto as Exhibit "J" are true copies of said judgment and notice of settlement thereof.

9. On August 21, 1975, plaintiff made an ex parte application to Judge Richard Owen for an enlargement of time until September 21, 1975 to appeal from the aforesaid judgment on the ground that plaintiff had not been advised by the Clerk of the entry of the judgment, and admittedly for the purpose of making the instant motion. On August 22, 1975, Judge Owen made an Order granting plaintiff's said motion. Copies of plaintiff's motion papers, accompanying letter to Judge Owen, and his Order granting the enlargement of time are annexed hereto as Exhibit "K".

PLAINTIFF'S MOTION UNDER RULE 60(b)

It will be noted that plaintiff's motion is based upon affidavits by plaintiff and one of his counsel. The affidavit of plaintiff is sworn to June 19, 1975 and is the identical affidavit previously submitted by plaintiff in support of his prior motion to reconsider the requirement that he post a \$25,000 bond as a condition to excusing his default.

If such affidavit by plaintiff is submitted as an affidavit of merits, it is obviously inadequate and insufficient for such purpose, as it contains merely conclusory allegations,

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

unsupported by any evidentiary facts. If plaintiff's said affidavit is submitted as evidence of his financial inability to post a bond, it is similarly insufficient and inadequate in that it shows, at best, merely an unsuccessful attempt to obtain from a bank in Saudi Arabia its guaranty to pay the sum of \$25,000 in favor of a United States Court. It is completely devoid of any showing that plaintiff is financially or otherwise unable to obtain the type of bond which is required to satisfy the condition to vacate plaintiff's default.

The affidavit by plaintiff's counsel, Mr. Fitzpatrick, purports to characterize plaintiff's deposition. If it is submitted as an affidavit of merits, it is similarly wholly inadequate and insufficient for such purpose. A mere reading of said affidavit shows that it is based purely upon hearsay and is devoid of evidentiary facts. Moreover, it is the recollection of deponent, who conducted the deposition of plaintiff, and on review of the transcript, that Mr. Fitzpatrick's characterization of plaintiff's deposition is inaccurate in many material respects. Said affidavit does not disclose that the deposition of plaintiff is far from being completed. In the course of such deposition plaintiff repeatedly referred deponent to a Mr. Dajani and to numerous documents for vital information in support of plaintiff's claim but which were not available

Affidavit in Opposition to Plaintiff's Motion Under Rule
60 (b) FRCP

at the deposition. Annexed hereto as Exhibit "L" is a copy of pages 577, 578 and 579 of the transcript of plaintiff's deposition taken by deponent, which indicate the incomplete and inconclusive nature of plaintiff's deposition to date.

In view of all of the foregoing, it is respectfully submitted that plaintiff's instant motion should be in all respects denied. He should not be allowed to use this motion under Rule 60(b) either as a vehicle for repeated reargument of prior motions to this Court, or as a substitute for an appeal from the judgment entered herein against plaintiff.

Sworn to before me this

MILTON WAXENFELD

// day of September, 1975.

Notary Public

CHARLES WAYNE
NOTARY PUBLIC, State of New York
No. 30-9554150
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976

REFERENCE TO EXHIBITS

Affidavit in Opposition to Plaintiff's Motion Under Rule 60 (b) FRCP

Exhibit "A", Notice of Motion for Default Judgment on Counterclaim as set forth on Page 13

Exhibit "B", Notice of Motion to Set Aside the Default Under Rule 55 (c) as set forth on Page 24

Exhibit "C", Affidavit in Opposition to Plaintiff's Motion to Set Aside H. Default and in Support of Westinghouse's Motion to Enter a Default Judgment as set forth on Page 32

Exhibit "D", Judge's Memo Endorsed - April 4, 1975 as set forth on Page 31

Exhibit "E", Notice of Motion for Default Judgment on Counterclaim as set forth on Page 42

Exhibit "F", Affidavit in Opposition to Defendant's Motion for Default Judgment on Counterclaim as set forth on Page 53

Exhibit "G", Notice of Motion and Motion to Modify Order as set forth on Page 56

Exhibit "H", Judge's Memo Endorsed - June 27, 1975 as set forth on Page 52

Exhibit "I", Judge's Memo Endorsed - July 2, 1975 as set forth on Page 62

Exhibit "J", Notice of Settlement of Judgment on Counterclaim as set forth on Page 64

EXHIBIT "K"

George T. Marshie
ATTORNEY AND COUNSELOR AT LAW

OFFICE: 474-4628
RES: 446-0611

503 EAST WASHINGTON STREET - SYRACUSE, NEW YORK 13202

August 21, 1975

Honorable Richard Owen
United States Courthouse
Foley Square
New York, New York
10007

Re: Abu Khadra v. Westinghouse
74 Civ. 5237 (E. W.)

Dear Judge Owen:

In accordance with my telephone conference with your office yesterday, I enclose herewith affidavit and motion for enlargement of time to appeal under Rule 4(a) FRAP. Since the application is made before the expiration of the time to appeal it is not made on notice; but a copy of the papers has been forwarded to counsel for defendant.

As I indicated on the telephone the reason for the requested 30-day extension is to permit a motion under Rule 60 (b) which, if successful, will obviate the necessity of an appeal. It is expected that such a motion is to be made returnable before Judge Weinfeld September 10.

With thanks for your consideration I am
Respectfully yours,

GEORGE T. MARSHIE

John S. Hogg
Of Counsel

cc: Weisman, Celler, Spett, Modlin & Werthelmer

EXHIBIT "K"

EXHIBIT "K"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

-against-

WESTINGHOUSE ELECTRIC CORPORATION

et al.,

Defendants

MOTION FOR ENLARGEMENT
OF TIME UNDER RULE 4 (a) FRAP

74 Civ. 5237 (E. W.)

Plaintiff moves the Court for an order enlarging until the 21st day of September, 1975, the period within which Plaintiff may appeal to the United States Court of Appeals for the Second Circuit from the judgment entered on the counterclaim herein on the 23rd day of July, 1975, on the ground of excusable neglect based upon the failure of plaintiff to receive notice of the entry of such judgment, under Rule 77 (d) FRCP, and to learn of the entry of said judgment specifically until the 21st day of August, 1975, as more particularly shown by the affidavit of John S. Hogg, Esq., hereto annexed.

August 21, 1975.

GEORGE T. WISHIE
Attorney for plaintiff

by JOHN S. HOGG
of Counsel
Office and Post Office Address
503 East Washington Street
Syracuse, New York 13202.

EXHIBIT "K"

EXHIBIT "K"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISRAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

-against-

AFFIDAVIT

WESTINGHOUSE ELECTRIC CORPORATION

et al.,

Defendants

74 Civ. 5237 (E. W.)

State of New York)

) ss.

County of Madison)

JOHN S. HOGG, being duly sworn, deposes and says that:

1. I am an attorney at law duly licensed to practice in the State of New York, and acting in the above matter as counsel to George T. Mahshie, Esq., attorney for the plaintiff herein.
2. As such counsel, I am familiar with the proceedings heretofore had herein.
3. At a hearing before Hon. Edward J. Weinfeld, held on June 24, 1975, Judge Weinfeld ordered entry of a default judgment upon a counterclaim interposed by defendant Westinghouse Electric Corporation herein.
4. For several weeks thereafter, no such judgment was entered.
5. On July 23, 1975, a final judgment on such counterclaim was duly entered.
6. To this date, no notice as is prescribed by Rule 77 (d) FRCP has been received by plaintiff or plaintiff's attorney.
7. From time to time telephone inquiry was made of the office of the clerk of the Court to determine if judgment had been entered, but the information was not available.
8. A messenger requested by deponent to go to the clerk's office notified deponent that a judgment had been entered, and forwarded to deponent a copy of the clerk's docket which was received by deponent this date, and which show that the date of entry was July 23, 1975.
9. Because plaintiff was not aware of the entry of final judgment on the counterclaim herein, the time to appeal will expire tomorrow, and no

EXHIBIT "K"

EXHIBIT "K"

notice of appeal has been filed and no bond for costs obtained; and because of the uncertainty of the postal service, plaintiff can have no assurance that such a notice of appeal and bond, if mailed to the clerk will be timely filed.

10. Because plaintiff's neglect to initiate appeal proceedings was due to the failure of the clerk to notify plaintiff, as required by the rules, such neglect is excusable and ought to be excused, so that the omission by the clerk will not deprive plaintiff of his day in court.

11. Accordingly, it is prayed that the court, in the interest of justice, as authorized by Rule 4(a) FRAP, extend the time for appeal herein; and that such time be extended by the 30-day period allowed by the rule in order to give plaintiff the opportunity to explore the possibility of relief alternative to appeal within such 30-day period.

John C. Hogg

Subscribed and sworn to before me,
this 21st day of August, 1975.

MARJORIE FULLER

MARJORIE FULLER
NOTARY PUBLIC, STATE OF NEW YORK
APPOINTED IN MADISON COUNTY
MY COMMISSION EXPIRES MARCH 20, 77

EXHIBIT "K"

NOTICE OF ENTRY

Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

GEORGE T. MAHSHIE

Attorney for

Office and Post Office Address, Telephone

503 E. WASHINGTON STREET

SYRACUSE, NEW YORK, 13202

(315) 474-4628

To

Attorney for

NOTICE OF SETTLEMENT

Since Please take notice that an order

of which the within is a true copy will be presented for settlement, to the Hon.

one of the judges of the within named court, at

on the day of 19

at M.

Dated,

Yours, etc.,

GEORGE T. MAHSHIE

Attorney for

Office and Post Office Address, Telephone

503 E. WASHINGTON STREET

SYRACUSE NEW YORK, 13202

(315) 474-4628

To

Attorney for

Index. No. 74 Civ 5237 (E. W.) Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KIADRA, d/b/a THE
MIDDLE EAST ELECTRO-MECHANICAL
CORPORATION,

Plaintiff,

-against-

WESTINGHOUSE ELECTRIC CORPORATION
et al.,

Defendants.

ORIGINAL

MOTION FOR ENLARGEMENT OF TIME
UNDER RULE 4 (a), FRAP,
and supporting AFFIDAVIT

GEORGE T. MAHSHIE

Attorney for Plaintiff

Office and Post Office Address, Telephone

503 E. WASHINGTON STREET

SYRACUSE, NEW YORK, 13202

(315) 474-4628

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Notice from

Remand

7/15/75

Aug 29/75

*u s d c
Filed*

Aug 29, 1975

S.D. of New York

EXHIBIT "K"

88
EXHIBIT "K"

EXHIBIT "L"

Abu Khadra

577

1 statements in Arabic and the translations - I
2 think they were E and G - those that were marked,
3 I gave back to you and I merely retained copies.
4

5 MR. FITZPATRICK: That is correct.

6 MR. WAXENFELD: The rest I have with the
7 understanding that I will reproduce copies for
8 myself and then return those documents which you
9 supplied and were marked.

10 MR. FITZPATRICK: Fine.

11 MR. WAXENFELD: With respect to the docu-
12 ments which I supplied and which were marked, I
13 will retain the originals that were marked and
14 I will supply you with a set of those documents.

15 MR. FITZPATRICK: That's fine.

16 MR. WAXENFELD: That would seem to take
17 care of the marking and distribution of the
18 exhibits.

19 MR. FITZPATRICK: Correct.

20 MR. WAXENFELD: With respect to the deposi-
21 tion of plaintiff, I would ask you to tell me now,
22 or if you can't tell me now, at your convenience,
23 of the date when we may have Mr. Dajani here for
24 deposition and those documents which we have
25 asked you to produce and which you have agreed to

EXHIBIT "L"

Abu Khadra

578

1
2 produce, if you have them.

3 One word of explanation: We have asked
4 to take the deposition of plaintiff and the
5 situation is a little unusual in that my recollection
6 of the record is very clear that on numerous
7 occasions when I asked for particulars, Mr. Abu
8 Khadra said, "You will have to ask Mr. Dajani."
9 And when it came to documentation or details
10 evidenced in documentation, Mr. Abu Khadra said,
11 "Those details we have in documents, but the
12 documents are in Riyadh and we will have to get
13 them," which is what led to my requesting some
14 of the documents.

15 So that with respect to many of the material
16 facts, Mr. Abu Khadra has referred me to Mr. . .
17 Dajani. He said, "Ask Mr. Dajani; he knows about
18 it." In those circumstances, I don't perceive
19 that I have had a deposition of the plaintiff,
20 when he tells me in so many areas that I have got
21 to ask somebody else for the information. And
22 it is my position that for me to get the deposition
23 of the plaintiff, which I am entitled to under
24 the notice that we served and under the court
25 order, that since Mr. Abu Khadra has referred me

EXHIBIT "L"

1

Abu Khadra

579

2

so extensively to Mr. Dajani, that I should have

3

Mr. Dajani to ask him the questions that Mr.

4

Abu Khadra has referred me to him for and to the

5

documents. Otherwise, I don't have the detailed

6

information and the particulars to which I am

7

entitled upon a deposition.

8

For that reason, I would ask you to let me

9

know when I may examine Mr. Dajani and see the

10

documents that you are going to produce to the

11

extent that you have them.

12

I further note that that does not necessarily

13

indicate that I might not have to get back to

14

Mr. Abu Khadra.

15

I will try not to and I might not have to,

16

but it is possible after Mr. Abu Khadra has referred

17

me to Mr. Dajani and I get to speak to Mr. Dajani,

18

he can refer me back to Mr. Abu Khadra and I will

19

be chasing myself around in circles.

20

Should that occur, should Mr. Dajani, to

21

whom I have been referred, refer me back to Mr.

22

Abu Khadra, I would obviously have to get to

23

him. Or should the documentation produced require

24

further examination of Mr. Abu Khadra, I merely

25

am indicating that I would reserve that right.

EXHIBIT "L"

NOTICE OF APPEAL - SEPTEMBER 19, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants.

NOTICE OF APPEAL

74 Civ. 5237
(E.W.)

Notice is hereby given that Ismael Abu Khadra d/b/a The Middle East Electro-Mechanical Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered upon the counterclaim in this action on the 23rd day of July, 1975.

Dated: September 19 , 1975

George T. Mahshie, Esq.
Attorney for Plaintiff
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

NOTICE OF APPEAL - OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST
ELECTRO-MECHANICAL CORPORATION,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and
WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

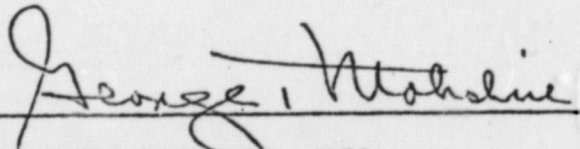
Defendants.

NOTICE OF APPEAL

Index No.
74 Civ. 5237
(E.W.)

Notice is hereby given that Ismael Abu Khadra d/b/a The Middle East Electro-Mechanical Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on the 25th day of September, 1975, denying plaintiff's motion under Rule 60 (b) for an Order setting aside the final judgment heretofore entered in this action on July 23, 1975.

Dated: October 9, 1975


GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

75-7551
C-13

ORDER CONSOLIDATING APPEALS

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the **Seventh** day of **November**, one thousand nine hundred and **Seventy-five**.

Ismael Abu Khadra, a/b/a The Middle East
Electro Mechanical Corporation,

Plaintiff-Appellant,

v.

Westinghouse Electric Corporation and
Westinghouse Electric International, S.A.

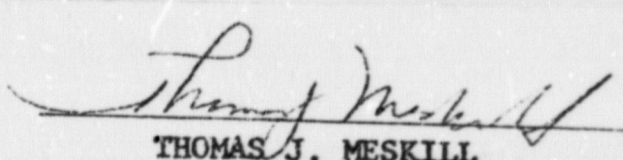
Defendant-Appellee.

It is hereby ordered that the motion made herein by counsel for the

appellant

~~appellee~~~~petitioner~~~~respondent~~

by notice of motion dated **October 9, 1975** to consolidate the appeal herein with the appeal in Docket No. T-5299 for all purposes; to file one record, one set of briefs and appendices and that one mandate issue be and it hereby is granted. ~~order~~


THOMAS J. MESKILL

Circuit Judges

December 8, 1975

Received one (1) copy of within Appendix.
Western Cells Great M. Allen +
Western, attys for B. J. Miller
Western, Gleason Cuprate.

